PP

v.

AWANG RADUAN AWANG BOL

FEDERAL COURT, PUTRAJAYA
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL HAMID MOHAMAD FCJ
ALAUDDIN MOHD SHERIFF FCJ
[CRIMINAL APPEAL NO: 05-60-2002 (Q)]
26 JANUARY 2005

CRIMINAL LAW: *Penal Code - Section 300 - Murder - Accused convicted by High Court - Conviction reduced to 'culpable homicide not amounting to murder' by Court of Appeal on ground that High Court failed to consider defence of 'sudden fight' - Section 300, Exception 4 - Whether trial judge must consider every possible defence - Whether a misdirection if he did not - Whether accused would have been able to establish ingredients of Exception 4 - 'Without premeditation in a sudden fight in the heat of passion upon a sudden quarrel' - 'Without the offender having taken undue advantage or acted in a cruel or unusual manner' - Whether there was any fight at all*

The accused was tried, convicted and sentenced to death in the High Court for the murder of a man. The trial judge had rejected his defence of 'intoxication' and/or 'grave and sudden provocation' under Exception 1 to s. 300 of the Penal Code ('the Code'). On appeal, however, the Court of Appeal reduced the charge to 'culpable homicide not amounting to murder' and sentenced the accused to 18 years of imprisonment. Whilst accepting the conclusions of the trail judge on the issue of 'grave and sudden provocation', the justices of appeal felt that he had misdirected himself in not considering the possible defence of 'sudden fight' under Exception 4 to s. 300 of the Code. Dissatisfied, the Public Prosecutor appealed to the Federal Court.

Held (allowing the appeal)
Per Abdul Hamid Mohamad FCJ delivering the judgment of the court:

[1] There was no need for the trial judge to refer to the defence of 'sudden fight' under Exception 4 to s. 300 of the Code in his judgment. This was because the accused would not, on the facts, have been able to establish the ingredients that make up Exception 4 to s. 300 of the Code, to wit, "without premeditation in a sudden fight in the heat of passion upon a sudden quarrel" and "without the offender having taken undue advantage or acted in a cruel or unusual manner". Indeed, there was no sudden fight

or any fight at all. There was a verbal exchange over money and, one hour later, the accused came back with an axe and a knife with which he hacked and stabbed the accused to death. In the final analysis, it would not, as the Privy Council opined in *Mohamed Kunjo v. PP*, "assist the administration of criminal justice if there were to be cast upon the High Court the duty of reciting in judgment only to reject every defence that might have been raised but was not". (pp 654 g-h, 655 a, e-f, h, 656 a-h & 657 a-b)

[Decision of Court of Appeal overturned; judgment of High Court confirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Tertuduh telah dibicara, disabit dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana membunuh seorang lelaki. Hakim bicara telah menolak pembelaan 'mabuk' dan/atau 'bangkitan marah besar dan mengejut' di bawah Pengecualian 1 s. 300 Kanun Keseksaan (Kanun') yang dikemukakan tertuduh. Bagaimanapun, semasa rayuan, mahkamah rayuan menurunkan pertuduhan kepada 'homisid salah tidak sampai membunuh' dan menjatuhkan hukuman 18 tahun penjara. Sementara menerima konklusi hakim bicara atas isu 'bangkitan marah besar dan mengejut', hakim-hakim rayuan berpendapat bahawa beliau telah tersalah arah akan dirinya kerana gagal mempertimbang kemungkinan wujudnya pembelaaan 'perkelahian mengejut' di bawah Pengecualian 4 s. 300 Kanun. Tidak berpuas hati, Pendakwa Raya merayu ke Mahkamah Persekutuan.

Diputuskan (membenarkan rayuan)
Oleh Abdul Hamid Mohamad HMP menyampaikan penghakiman mahkamah:

[1] Tiada keperluan bagi hakim bicara untuk merujuk kepada pembelaan 'pergaduhan mengejut' di bawah Pengecualian 4 s. 300 Kanun dalam penghakimannya. Ini kerana tertuduh, di atas fakta, tidak berupaya untuk membuktikan ingredien-ingredien yang terkandung dalam Pengecualian 4, iaitu "tanpa direncanakan dalam satu pergaduhan mengejut dalam keadaan marah yang berbangkit dari pergaduhan mengejut" dan "tanpa pesalah tersebut mengambil peluang tidak wajar atau bertindak dengan kejam atau secara luar biasa". Malah, tidak wujud sebarang pergaduhan mengejut atau apa-apa pergaduhan sekalipun. Apa yang wujud adalah suatu pertengkaran mengenai wang, dan sejam kemudian, tertuduh datang semula dengan sebilah kapak dan pisau dengan mana beliau menetak dan menikam mangsa sehingga mati. Pada analisa terakhir, sepertimana yang dikatakan oleh Privy

Council dalam *Mohamed Kunjo v. PP*, ianya tidak akan "membantu pentadbiran keadilan jenayah sekiranya beban diletak ke atas Mahkamah Tinggi untuk membincang dan menolak dalam penghakimannya setiap pembelaan yang mungkin dibangkitkan tetapi yang tidakpun dibangkitkan.

Keputusan Mahkamah Rayuan diakas; keputusan Mahkamah Tinggi disahkan.]

Case(s) referred to:
Mohamed Kunjo v. PP [1978] 1 MLJ 5 ***(foll)***

Legislation referred to:
Penal Code, s. 304(a)

For the accused - Hii Hieng Singh; M/s Hii & Co
For the prosecution - Nurhuda Nuraini Mohd Noor DPP

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad FCJ:
The respondent (the accused in the High Court and the appellant in the Court of Appeal) was charged as follows:

> That you, on the 25th day of November, 1994 at about 9.50 p.m. at Kampung Tutus Hilir, Mukah, in the District of Mukah, in the State of Sarawak, committed murder by causing the death of one Awang Jamli b. Awang Sani (m) and that you have thereby committed an offence punishable under Section 302 of the Penal Code.

The trial judge found the respondent guilty of the offence charged, convicted him and sentenced him to death. He appealed to the Court of Appeal which allowed his appeal and reduced the charge to one under s. 304(a) of the Penal Code and sentenced him to 18 years imprisonment from 26 November 1994, ie, the date of arrest. The public prosecutor appealed to this court. We allowed the appeal and confirmed the judgment and sentence of the High Court.

The facts are quite straight forward. On 25 November 1994 about 8pm Sabri bin Jol ("Sabri") and Awang Jamli bin Awang Sani ("the deceased") were in Yong Rang coffee shop. Then Rozlan and Ariffin joined them. Later the respondent (the accused) came to the shop. They all drank alcoholic drinks. The respondent then asked money from the deceased. The deceased told the respondent that he only had RM1.50. When the deceased did not give any money to the respondent, the respondent said "kedekut" in an angry manner.

The respondent then asked for money from Yii Yong Kang ("Yong Kang") who gave him 50 cents. According to Yong Kang, after he gave the respondent 50 cents, the respondent said "Kedekut" and "Celaka" very loudly.

After they had finished drinking, Ariffin and the deceased went to the junction off Jalan Kampung Tutus Hilir and Jalan Kampung Bedanga while Sabri went home.

At about 9pm Rozlan was playing chess with the deceased at the said junction. Later Awang Roslan came and joined them. After that the respondent came and left after a short while. After the respondent left, Rozlan went home as he was hungry. Then the respondent came back. The respondent hacked the deceased with an axe. The deceased defended himself with his hands. The axe was thrown off. After that the respondent stabbed the deceased with a knife. Awang Roslan told the respondent to stop but the respondent ignored his plea.

It is to be noted that the deceased suffered five injuries. The first was a superficial wound on the forehead measuring 4 1/2 cm by 1/2 cm. There were two injuries on the chest, one on the left, an oval-shaped wound measuring 3cm by 1 1/2 cm. On the right side, there was an irregular shaped wound measuring 6 1/2 cm by 2 cm. On the back of the deceased there were two injuries, one, a linear incised wound 5 cm by 1/2 cm above the left scapular and the other, an oval incised wound 4cm by 1 1/2 cm at the left inter-scapular region which caused hypovolemic shock (ie, massive bleeding). The last-mentioned injury penetrated the heart that caused massive bleeding which caused the death of the deceased.

In the High Court, the respondent put up a defence of intoxication and grave and sudden provocation. Both were rejected by the learned trial judge.

The Court of Appeal, in a 5 – page judgment, agreed with the learned trial judge regarding the defence of intoxication and grave and sudden provocation. This part of the judgment is worth quoting:

> 8. On the defence of drunkenness and provocation (exception 1) as dealt with by the learned trial judge, we have no quarrel with his lordship's finding. However, what troubled us is with regard to the evidence as enumerated above. Based on the above evidence, it raised a possible defence of a sudden fight as envisaged under exception 4 to s. 300 of the Penal Code, which the learned judge failed to consider (see the case *Haji Talib v. PP* [1969] 1 MLJ 94). The said exception states:

> Exception 4 – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Such omission, in our view, is tantamount to a misdirection.

> 9. At the time of the incident, the accused was armed with an axe and a knife. It is quite possible that had the learned judge directed his mind on exception 4, the very nature of the stab wounds inflicted on the deceased, might be held to have taken the case out of the exception by reason of the accused appearing to have taken undue advantage of the deceased and having acted in a cruel or unsual manner. However, this was a question of fact for the learned judge to consider.

> 10. In the premise and for reasons given above, we allow the appeal on conviction and substitute therefor a verdict of culpable homicide not amounting to murder, punishable under s. 304(a) of the Penal Code.

It is to be noted that while agreeing with the judgment of the learned trial judge, the Court of Appeal held that there was a misdirection on the part of the learned trial judge for not considering the defence of "sudden fight in the heat of passion upon a sudden quarrel" as provided by exception 4 to s. 300 of the Penal Code. That was the only reason why the Court of Appeal reversed the judgment of the High Court. This is in spite of what the Court of Appeal said in para. 9 of the judgment quoted above, briefly, that it was quite possible that had the learned trial judge directed his mind to exception 4 and the fact that the respondent was armed with an axe and a knife and the nature of the stab wounds inflicted on the deceased, the learned trial judge might have held that the facts would have "taken the case out of the exception by reason of the accused (respondent-added) appearing to have taken undue advantage of the deceased and having acted in a cruel and unusual manner."

The Court of Appeal added:

> However, this was a question of fact for the learned judge to consider.

In other words, the stand taken by the Court of Appeal was that, as the learned trial judge did not consider the defence under exception 4 ("sudden fight") it was a misdirection and therefore the conviction must be quashed.

Regarding the relevant law, the case of *Mohamad Kunjo v. Public Prosecutor* [1978] 1 MLJ 5, a Privy Council appeal from Singapore is of utmost importance.

Let us first look at the facts of that case. The appellant and the deceased were friends. Both worked for the same employer. Both lived in a store belonging to the employer though in separate rooms. On the day and at the time in question, both of them who appeared to be highly intoxicated were seen sitting on a stack of poles. They were talking loudly and laughing. They got down from the sack and began to argue. The argument generated into wrestling. As they grappled with each other they fell down, got up and fell down again. This happened several times. They punched each other as they fought. Suddenly the appellant ran toward the store where a lorry was parked and returned with the exhaust pipe of a motor vehicle. He then rushed at the deceased, who was standing up and delivered one blow on his head with the exhaust pipe. The deceased tried to defend himself with his hands, but almost at once fell to the ground. The appellant then hit his head three or four times with the exhaust pipe. He then threw the exhaust pipe on the ground and walked away. The deceased died.

It is to be noted that in that case the defence of "sudden fight" was not brought up either in the High Court or the Court of Appeal. The defence was also not considered by both courts. However, it was brought up for the first time at the Privy Council.

The Privy Council held (headnotes):

> (3) a defence based upon an exception which the defendant has to prove may be raised for the first time before the Board if the Board considers that otherwise there would be risk of failure of justice. The test must be whether there is sufficient evidence upon which a reasonable tribunal could find the defence made out. If there be such evidence, the court of trial should have expressly dealt with it in its judgment and the Judicial Committee will deal with it on appeal, even though it has not been raised below;
>
> (4) in the face of the evidence in this case, the appellant could not show that he had not taken undue advantage or acted in a cruel or unusual manner and therefore there was no need for the trial judges to refer to the defence of sudden fight in their judgment.

Lord Scarman, *inter alia* said:

> Moreover, it would not, in our judgment, assist the administration of justice if there were to cast upon the High Court the duty of reciting in judgment only to reject every defence that might have been raised but was not.

The judgment went on to say as follows:

> We turn now to the question whether in the present case the evidence was such that the High Court could have reasonably concluded that the defence of sudden fight was made out. There was evidence that the act causing death was done without premeditation. ...
>
> In the present case there was evidence that suggested strongly the absence of any element of design or planning. There was also evidence that the blow, or blows, were struck "in a sudden fight in the heat of passion upon a sudden quarrel", though there was also evidence (ie, going in search of the weapon, returning with it, and striking the deceased when he appeared to be neither aggressive nor on his guard) which suggested the contrary. But formidable difficulties face the appellant when he attempts to show that the act causing death was committed "without the offender having taken undue advantage or acted in a cruel or unusual manner". The appellant, who had been engaged in a fight with the deceased, ran to get a weapon and returned to attack the defenceless deceased with a truly murderous weapon, the exhaust pipe, a photograph of which we have seen. The evidence of the assault shows that the deceased was taken by surprise and attacked with a very unusual and unexpected weapon, a heavy blow on the head from which could reasonably be expected to be lethal. ...
>
> In the face of the evidence, we do not see how the appellant could prove that he had not taken undue advantage or acted in a cruel or unusual manner.
>
> There was therefore, no need for the trial judge to refer to the exception in judgment. Indeed, had the trial been a jury trial, we doubt whether the judge would have considered it necessary to put the defence to the jury. In our judgment, therefore, the appellant's argument based on the exception of "sudden fight" fails.

Having said that, the Privy Council dismissed the appeal which, in effect, means that the conviction was affirmed, even though on the facts, in our view, the case for the appellant in that case was much stronger than in this case.

In the present case, like in *Mohamed Kunjo (supra)*, the defence was never raised in the High Court or in the Court of Appeal. But the Court of Appeal took upon itself to consider the defence in its judgment. The court had in fact gone further than what had happened in *Mohamed Kunjo (supra)*. In that case, at least the defence was raised by the appellant before the Privy Council. However, we are prepared to accede that the Court of Appeal was not prevented from considering that defence but, on condition that there must be sufficient evidence upon which a reasonable tribunal could find the defence made out.

Is there such evidence? We find none. First there was no sudden fight, indeed there was no fight at all. The deceased was drinking with his friends when the respondent came to the shop. He too drank. Then he asked for money from the deceased. When the deceased did not give him money he angrily said "kedekut". He went away. More than one hour later, when the deceased and his friends were playing chess at the junction the respondent came for a while and went away. Soon he came back armed with an axe and a knife. He struck the deceased with the axe. The axe having fallen, he stabbed the deceased with his knife. The injury on the forehead of the deceased must have been caused by the axe and four more injuries obviously were caused by stabbing, one of which, on the back, punctured the heart. There was no quarrel before that. The deceased tried to defend himself with his arm when he was attacked with the axe. The struggle began after the deceased was attacked with the axe.

Indeed, the respondent admitted in cross examination that at the material time he wanted to punish the deceased and that he wanted to use the axe and the knife for the purpose. He agreed that normally he did not carry an axe and a knife. He agreed that he went home to look for the knife and the axe which he had to search and it took quite a long time. He agreed that he waited about 20 feet away from the deceased for people to go away from the deceased. He agreed that he went suddenly to the deceased without warning. He agreed that it was wrong to attack the deceased and added that it was a mistake. He agreed that he knew that the deceased could not fight him as the deceased was not armed and smaller than him. He agreed that he attacked the deceased to revenge his anger earlier on at Yong Kang coffee shop. He agreed that he had a grudge against the deceased because the deceased always promised him for a drink but never did so.

On such evidence and coming from the respondent himself, it is clear that the respondent did not hack the deceased with the axe and stabbed him with the knife in a sudden fight in the heat of passion, upon a sudden quarrel. The elements of design or planning is there. In the face of such evidence we do not see how the respondent could ever succeed in proving the sudden fight.

Secondly, to succeed in that defence, the respondent must prove that he had not taken undue advantage or acted in a cruel manner. Again, in the face of the evidence, we do not see how he could ever succeed in proving that ingredient. If we compare the facts of this case with that of *Mohamed Kunjo (supra)*, the facts in *Mohamed Kunjo, (supra)* are more favourable to the accused, yet the Privy Council held that it could not see how he could prove that he had not taken undue advange or acted in a cruel manner.

With respect, the Court of Appeal did not sufficiently consider the evidence. The evidence of the respondent quoted by the Court of Appeal in its judgment, even if it is meant to support the argument of a sudden fight, clearly does not support it. The respondent was asked "Did Awang Jamli (deceased – added) respond **after** (emphasis added) you hit him with the axe? The respondent's reply was "Yes. We were struggling with each other". The struggle only started **after** the respondent hacked the deceased with the axe. There was no quarrel, no sudden fight. It was a cold blooded attack first with the axe followed with the knife. In the circumstances, we are of the view that the Court of Appeal had misdirected itself.

For these reasons, we allowed the appeal set aside the order of the Court of Appeal and confirmed the conviction and sentence imposed by the High Court.